No. 458811-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

COMMUNITY HEALTH PLAN OF WASHINGTON, a Washington Health Plan, and MOLINA HEALTHCARE OF WASHINGTON, INC.,

Respondents,

v.

MARYANNE LINDEBLAD, in her official capacity as Director of Washington State Health Care Authority, and WASHINGTON STATE HEALTH CARE AUTHORITIY,

Petitioners,

COORDINATED CARE CORP., UNITED HEALTHCARE OF WASHINGTON, INC., and AMERIGROUP WASHINGTON, INC.,

Petitioner-Intervenors.

BRIEF OF PETITIONER-INTERVENORS

PACIFICA LAW GROUP LLP

1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
(206) 245-1700

Matthew J. Segal, WSBA #29797
Gregory J. Wong, WSBA #39329
Jamie Lisagor, WSBA #39946
Attorneys for Coordinated Care Corporation

DORSEY & WHITNEY LLP

701 5th Ave Ste 6100
Seattle, WA 98104
(206) 903-2417

Peter Ehrlichman, WSBA # 6591
Shawn Larsen-Bright, WSBA # 37066
Attorneys for United Healthcare of Washington, Inc.

WILLIAMS KASTNER & GIBBS PLLC

601 Union St Ste 4100
Seattle, WA 98101-1368
(206) 628-6600

Mary Re Knack, WSBA # 26945
Manish Borde, WSBA # 39503
Attorneys for Amerigroup Washington, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Rules

I. INTRODUCTION

The Washington State Health Care Authority ("Authority") issued the RFP and contract at issue in this case with the explicit objective of increasing competition to provide more options for Washington Medicaid receipients.[1] The RFP—which was designed to address state legislative directives and the impending implementation of the federal Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119—incentivized new plans serving Medicaid recipients to enter and become sustainable in Washington by heavily favoring them in the assignment of individual enrollees who did not self-select a plan. The record below demonstrates that all of the plans who responded to the RFP and were awarded contracts knew this was one of the primary objectives of the RFP. The trial court below, however, interpreted the contract and surrounding extrinsic evidence in the exact opposite manner, construing it to favor the Legacy Plans in assignment to the detriment of the New Plans.

The trial court erred in three ways. First, the trial court ignored the plain language of the Contract and the extrinsic evidence that, at a minimum, created a genuine issue of material fact precluding summary judgment. Indeed, the New Plans (Coordinated Care, United Healthcare

[1] The New Plans join in the Authority's Opening Brief in its entirety. The New Plans incorporate herein the defined terms, assignments of error, facts, and argument in the Authority's Brief.

of Washington, Inc. and Amerigroup Washington, Inc.) and the Authority (four of the six parties to the Contract) each offered evidence regarding the stated intent of the Contract. The trial court wrongly ignored this extrinsic evidence, viewed the facts in a light most favorable to the moving parties (instead of the non-moving parties), and improperly granted summary judgment. Moreover, the Legacy Plan's reliance on prior contracts to argue a course of dealing relevant to the Assignment Methodology is without merit. The pre-RFP contracts used an entirely different assignment methodology, and the New Plans were not parties to those contracts as they are to the Contract at issue in this case.

Second, the trial court's ruling effectively bound the New Plans to a draft recommendation that was the result of an informal dispute conference; a conference to which the New Plans were not invited or given an opportunity to present argument or evidence. The trial court's procedural ruling, if upheld, would deprive the New Plans of due process.

Third, the trial court erred in its causation analysis by focusing on whether the Authority caused a breach of contract, not on whether the alleged breach proximately caused the Legacy Plans' claimed damages.

For each of these reasons, the Court should reverse the trial court's grant of summary judgment to the Legacy Plans.

II. ASSIGMENTS OF ERROR

The New Plans join and incorporate herein the assignments of error and issues pertaining to the errors as set forth in the Authority's Opening Brief. Auth. Br. at 2-3. The New Plans present the following additional issues pertaining to the assignments of error:

1. Whether the trial court improperly ignored the plain language of the Contract and undisputed extrinsic evidence regarding the objective and intent of the Contract in granting summary judgment.

2. Whether a course of dealing may exist where the Contract's Assignment Methodology differs entirely from the Legacy Plans' prior contracts with the Authority and the New Plans were not parties to the prior contracts.

3. Whether the trial court's ruling on the Legacy Plans' Procedural Claim effectively bound the New Plans to a draft recommendation without basic components of due process such as an opportunity to be heard and present argument and evidence.

4. Whether the trial court's ruling that the Authority caused a breach of contract meets the legal requirement that the Legacy Plans establish proximate causation of their damages.

III. SUPPLEMENTAL STATEMENT OF THE CASE

As the Authority demonstrated in its Opening Brief, the crux of this case is whether Family Connects and Plan Reconnects count against each Plan's proportional share of assignments under the Assignment Methodology. This determination depends on the meaning of the March 2012 Contract that the Authority executed separately but simultaneously with five MCOs (the New and Legacy Plans).[2] The Plans' contracts are identical in all material respects, and the assignment provisions are interdependent, in that each Plan's proportion of assignments is relative to the other Plans' proportions. *See* CP 1570; CP 1574. Consequently, any interpretation of the Contract's Assignment Methodology impacts the rights of all Plans.

A. The Authority Designed the Contract's Assignment Methodology to Favor New Plans as New Market Entrants.

In response to legislative directives[3] and in preparation of expansion of Medicaid under the ACA, the Authority drafted the Assignment Methodology to encourage new MCOs to enter Washington State and become sustainable by favoring them in the assignment process. *See* Auth. Br. at 5-7. During the RFP process, all entities responding to

[2] MCOs are groups of doctors, clinics, hospitals, pharmacies and other providers who work together to take care of their members' health care needs.

[3] *See* Laws of 2011, 1st Spec. Sess., ch. 50, § 213(32) (Authority must "place substantial emphasis upon price competition" and not "increase the actuarial cost of service"); RCW 74.09.522(5) (importance of competition in Medicaid managed care).

the RFP had an opportunity to understand the scope and application of the Assignment Methodology. The Authority provided information about assignments in All-Plan Meetings. CP 2313 at ¶ 5. The Plans also had the opportunity to submit questions to the Authority about the RFP. CP 3032-35; CP 3072-74; CP 3076-136. Throughout these interactions and information exchanges, the Authority never stated that it would exclude Family Connects or Plan Reconnects from counting against each Plan's proportional assignments. Each of the New Plans presented testimony on this point. *See, e.g.*, CP 2189-90 at ¶¶ 6, 7; CP 2314 at ¶¶ 8, 9; CP 2341 at ¶ 7; CP 1050-51 at ¶¶ 4, 6. Notably, the Legacy Plans have never identified any document or conversation to the contrary. *See, e.g.*, CP 3057 at 139:8-16 (CR 30(b)(6) Dep. of CHPW) (CHPW is "not aware" of the Authority ever communicating such an exclusion); CP 2746-47 at 72:7-73:1 (CR 30(b)(6) Dep. of Molina) (Molina simply "assumed" (incorrectly) that such an exclusion existed).

The Authority also provided the Plans with specific information to assist in their enrollment forecasting ("Assignment Matrix" or "Matrices"). *See, e.g.*, CP 2315 at ¶¶ 10, 11; CP 2334-36; CP 2189-90 at ¶ 8; CP 2198-200. The Matrices provided a basis from which each Plan could assess its expected enrollment proportion that the Authority tied to the Assignment Methodology. *Id.* The Matrices provided a total

assignment population and each Plan's expected percentage of enrollment by county. *Id.* There is no mention in any pre-contract implementation Assignment Matrix that the "Assignment Proportions" excluded Family Connects or Plan Reconnects. *See id.*

Indeed, if anything in the RFP or the Authority's communications had indicated that the assignment pool would be artificially reduced by excluding Family Connects and Plan Reconnects, the New Plans would have recognized that significant point. *See, e.g.,* CP 2314 at ¶ 9; CP 2341 at ¶ 7. And it would have materially impacted the New Plans' decision to enter the Washington Medicaid market. CP 2341 at ¶ 7 (Coordinated Care "would not have bid on the RFP" had it been aware of such an exclusion); CP 2346 at ¶ 6 (favorable assignments to New Plans was "key incentive" for Amerigroup to enter Washington because otherwise it may not be able to achieve viable scale); CP 2190 at ¶ 9 (United's investment in Washington was based on the intent of the Contract to "foster the growth and viability of New Plans"). Each of the New Plans invested substantial resources to develop operations in Washington on the understanding (based on the RFP and supporting materials) that they would receive a share of enrollment sufficient to build rapidly a viable, competitive plan through preferential enrollee assignments. *See, e.g.*, CP 2190 at ¶ 9 (United); CP 1980 at ¶ 16 (Coordinated Care); CP 2340-41 at ¶ 6

(Amerigroup). The Legacy Plans also recognized the importance of the favoring of the New Plans in the Assignment Methodology—they have fought against the Assignment Methodology all the way from the formative stages of the RFP to the appeal before the Court today.[4]

B. The Authority Held Informal Dispute Conferences with the Legacy Plans, But *Not* the New Plans.

Shortly after contract implementation, it became clear that the New Plans were receiving significantly fewer enrollees than the Authority and the Plans had expected. CP 3164; CP 2230 at ¶¶ 8, 9. The Authority recognized the assignment error was the result of a mistake that excluded the Family Connects and Plan Reconnects from the assignment proportions. CP 2230 at ¶ 10. The Authority determined that a correction was needed to restore enrollment to its intended distribution outcome. CP 2661-62. Despite the Contract's plain language and the Authority's communications, the Legacy Plans objected once the Authority informed the Plans it was correcting the proportional assignments to align with the Authority's intent in the RFP (and the Authority's and the New Plans' understanding of how the Contract would be implemented). CP 2506 at ¶ 26(a).

[4] *See, e.g.*, CP 3064-65 (recognizing impact); CP 3067-68 (similar); CP 3038-41 at 80:6-83:22 (CHPW lobbying efforts to stop the Assignment Methodology).

The Legacy Plans requested and received informal dispute conferences to "address" the matter as provided for in the Contract. CP 2566 (Contract, Section 2.9.2). The New Plans were never notified of these dispute conferences and were not given an opportunity to be present, submit evidence, or be heard. CP 3226-27. Authority Director MaryAnne Lindeblad designated Authority employee Clay King to conduct the informal conferences. CP 2293-94 at ¶ 15. But Director Lindeblad retained authority to determine the final outcome. CP 2293 at ¶ 14. Director Lindeblad retained the power to decide the dispute because it involved thousands of Medicaid enrollees and potentially tens of millions of dollars and because the business issues of the Plans had to be considered in the larger context of the Authority's mission to serve vulnerable Medicaid clients through all five plans. *See id.*

This process employed by the Authority was consistent with its past practice for dispute conferences. Authority staff conducting dispute resolution conferences organize, schedule, and regulate the conduct of the conference consistent with the terms of the contract and agency rules, but staff are never delegated the complete and independent authority to decide a dispute. *See* CP 2298-99 at ¶¶ 7-9. Indeed, the Authority has developed a comprehensive list of "best practices" that employees use at dispute conferences, including an emphasis on the informality of the process and

the ultimate authority of Authority management to decide the issue. *See* CP 2299 at ¶ 10.

The Legacy Plans understood that Director Lindeblad retained authority to make the final decision following their conferences. *See* CP 2265-66 at ¶¶ 5-7. Mr. King told the Legacy Plans during the conferences that he would draft and present a recommendation to Director Lindeblad, but Director Lindeblad would make the final decision. *Id.* And the Legacy Plans acknowledged that Director Lindeblad would be the one making the decision. CP 3229 (post-conference letter from CHPW recognizing that Mr. King was going to consult with Director Lindeblad); CP 3231 (post-conference letter from CHPW requesting Director Lindeblad issue written decision on expedited basis).

Consistent with this understanding, Mr. King prepared an unsigned, draft recommendation and met with Director Lindblad following the informal conferences. CP 2294 at ¶ 17. Of course, Mr. King's draft recommendation did not and could not take into account the position of or evidence from the New Plans because they were not present.

Following the conferences, Director Lindeblad recommended a facilitated discussion among all five Plans and the Authority to see if a workable, collaborative solution on the contract issues could be developed. CP 2294 at ¶ 19; CP 1769-70 (notice to Plans that "under

Section 2.9.2 of the Contract, and after conferring with Mr. King," Director Lindeblad recommended a facilitated discussion among all parties). Ultimately, a meeting of all the Plans and the Authority occurred but did not resolve the underlying dispute. CP 2294 at ¶ 19. Afterward, Director Lindeblad announced her final decision on the client-assignment issue. CP 2294-95 at ¶ 20. The Legacy Plans then filed this lawsuit. Only well after the lawsuit was filed did the Legacy Plans challenge Director Lindeblad's authority to render her decision.

C. The Commissioner Granted Review Based on the Trial Court's Obvious Errors.

The Legacy Plans sued the State seeking declaratory and injunctive relief and tens of millions of dollars in breach of contract damages. CP 10-24. The trial court granted the New Plans' motions to intervene and, shortly thereafter, the parties commenced discovery. *See* CP 1031-32 (Coordinated Care); CP 1218-22 (Amerigroup); CP 3402-03 (United).

In August 2013, the Legacy Plans moved to dismiss their declaratory and injunctive relief claims, leaving only their breach of contract claims against the Authority. CP 1326-29. In this posture, the Legacy Plans concurrently moved to dismiss the New Plans; they argued "in a nutshell that . . . the [New Plans] have no 'direct and substantial' interest in this litigation." VRP, Sept. 9, 2013, at 8:1-3. The trial court

disagreed. *Id.* at 16:4-10. In particular, the court noted that all the Plans have "similar interests" in "determining what the meaning of the contract is[.]" *Id.* at 16:11-18. The trial court concluded that all the Plans have an interest in the crux of this case now subject to discretionary review, *i.e.*, whether Family Connects and Plan Reconnects count against each Plan's proportional share of assignments under the Contract. *See id.*

The Legacy Plans subsequently filed two summary judgment motions. In their motion on breach of contract, the Legacy Plans asserted that the Contract and extrinsic evidence created an "obligation" for the Authority to exclude Connects and Reconnects from the Assignment Methodology. CP 1578. This argument was based first on an assertion that in a specific month there may, hypothetically, be more Connects and Reconnects than a Plan's proportional assignments (no actual evidence of this occurring was presented). CP 1578-1579. The Authority had offered testimony on this point, stating that the assignment proportions were meant to be achieved over the course of the 18-month Contract, not calculated with precision each and every month of the Contract. CP 1477 at 227:1-11. Regardless, the Legacy Plans disputed this evidence and set forth that they should be entitled to all of their Connects and Reconnects in addition to full assignment proportions under the Assignment Methodology, despite the fact that this would achieve the opposite of the

Contract's objective and intent by providing the Legacy Plans (instead of the New Plans) the bulk of enrollees. Indeed, the Legacy Plans' entire brief completely ignored the Legislature's directives and the Authority's objective and intent in issuing the RFP and Contract as a means to facilitate the New Plans' viability in Washington. *See* CP 1567-1595.

The Legacy Plans also argued that their prior contracts with the Authority established a course of dealing that required the Assignment Methodology favor the Legacy Plans by excluding the Connects and Reconnects. CP 1584-87. The Legacy Plans did not dispute the evidence that the prior contracts used an entirely different assignment methodology based on capacity or that the New Plans were not parties to those contracts. *See* CP 2824-25; CP 2959-60; CP 2740-41 at 27:6-28:5.

In their motion on the procedural issue, the Legacy Plans argued that they were entitled to Clay King's draft, unreleased recommendation as a final determination of the issues binding on all Plans. CP 1956-76.

The trial court accepted the Legacy Plans' arguments, ruled that the Authority had breached the agreement, and found causation, even though the Legacy Plans had not provided any evidence or substantive argument on either causation or damages. In doing so, the trial court did not analyze whether the breach caused any alleged damages, but whether the Authority caused the breach. VRP, Jan. 15, 2014, at 63:9-16 ("Well, I

can't think of any way that there wouldn't be causation under the facts here, and that is, that this breach was caused by the state drafting something in an imprecise way[.]"). The trial court also adopted Mr. King's draft recommendation as binding on all of the Plans, even the New Plans who were not invited or allowed to participate in the informal conferences. CP 3334-38.

The Court subsequently dismissed the Legacy Plans' previously non-suited claims for declaratory and injunctive relief. CP 3339-41.

The Commissioner granted discretionary review of the trial court's grant of summary judgment. Ruling Granting Review at 17. The Commissioner ruled that the trial court committed obvious error because it failed to apply the summary judgment standard under CR 56(c), ignored the extrinsic evidence favoring the Authority and New Plans' interpretation of the Contract, and erred in its analysis of the causation element. *Id.* at 16 and n.10.

IV. ARGUMENT

The New Plans join, and incorporate by reference, the Authority's argument on each of its assignments of error. The New Plans also offer the following supplemental arguments in support of reversal of the trial court's summary judgment rulings. In so doing, the New Plans note the complete illogic of the trial court's ruling when viewed in the light of the

intent of the Legislature and the Authority. An overarching objective of the RFP was to improve quality of care through increased market competition. A primary means of accomplishing this goal was to favor the New Plans in the assignment process, a fact the record shows all five Plans understood. Yet, the Legacy Plans argued and the trial court accepted an interpretation of the Contract that undermined this goal entirely and awarded substantially higher assignments to the Legacy Plans. When the Legacy Plans learned of the Authority's initial mistake in its application of the Assignment Methodology, they attempted to convert it into a windfall at the expense of the public and the New Plans, even going so far as to argue that a draft decision from an agency employee should bind the Authority and control the trial court's determination of this action. The trial court's rulings should be reversed.

A. The Trial Court Ignored the Plain Language, Objective, and Intent of the Contract.

This Court should reverse the trial court's summary judgment interpretation of the Contract to exclude Family Connects and Plan Reconnects from the Assignment Methodology. *See* Auth. Br. at 23-27. To reach this decision, the trial court disregarded the plain language of the Contract and its universally understood objective and intent. In so doing, the trial court departed from the applicable rules of contract interpretation

and the summary judgment standard (where evidence must be viewed in the light most favorable to the non-moving party). *See Tanner Elec. Coop. v. Puget Sound Power Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) ("touchstone" of contract interpretation is the parties' intent); *Tjart v. Smith Barney Inc.*, 107 Wn. App. 885, 895, 28 P.3d 823 (2001) (contract must be interpreted under the "context rule" enunciated in *Berg v. Hudesman*, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990), *i.e.*, "as a whole, including the subject matter and objective of the contract");[5] *Bank of Am., N.A. v. Owens*, 173 Wn.2d 40, 49, 266 P.3d 211 (2011) (court must view "the facts and all reasonable inferences in the light most favorable to the nonmoving parties" on summary judgment) (quotation omitted).

1. The trial court's claim that its ruling was based on the "clear language" of the Contract was without basis.

In its oral decision, the trial court stated that it was holding the Authority to the "clear language of the [C]ontract," which it found excluded Family Connects and Plan Reconnects from the Assignment Methodology. VRP, Jan. 15, 2014, at 62. But nothing in the plain language of the Contract excludes Family Connects and Plan Reconnects

[5] Notably, under the context rule, extrinsic evidence is admissible to show the "entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent." *Berg*, 115 Wn.2d at 667, 669 (overruling cases requiring ambiguity before assessing such extrinsic evidence).

from the Assignment Methodology; it does not even mention them. CP 2537-38 (Section D of the RFP); CP 2594 (Contract, Section 5.14). Indeed, the Legacy Plans did not advance a plain language argument in their summary judgment briefing and relied instead on arguments based on extrinsic evidence. CP 1567-95 (Motion); CP 3305-16 (Reply). And despite holding the Authority to the "clear language," the trial court acknowledged that the Authority may not have fully expressed in the Contract the meaning of the Assignment Methodology. VRP, Jan. 15, 2014, at 61-62. Accordingly, extrinsic evidence may be used to prove the intent of the parties. *Berg*, 115 Wn.2d at 662.

2. The extrinsic evidence establishes that the objective and intent of the Contract was to include Connects and Reconnects in the Assignment proportions.

Here, the extrinsic evidence makes clear that Family Connects and Plan Reconnects were part of each Plan's proportional assignments. The Authority meant for the RFP and Contract to increase competition, foster innovation, and expand capabilities to meet the needs of Medicaid clients. *See, e.g.*, CP 2502 at ¶¶ 6-8. All parties understood this was the objective and that the Authority designed the Assignment Methodology to favor the New Plans. *See, e.g.*, CP 2188 at ¶ 4; CP 1978 at ¶ 7. From its PowerPoint presentations, to the information shared at All-Plan Meetings, to the Assignment Matrices, the Authority never indicated that Family

Connects and/or Plan Reconnects would be excluded from the assignment pool. *See, e.g.*, CP 2314 at ¶¶ 8, 9. The plain language of the Contract is consistent with this evidence, as the Assignment Methodology does not exclude Family Connects and Plan Reconnects. *See* CP 2537-38 (Section D of the RFP); CP 2559 (Contract, Section 1.70); CP 2594 (Contract, Section 5.14). And had it been understood that they would be excluded, one or more of the New Plans would not have bid on the RFP or executed the Contract. *See* CP 2341 at ¶ 7 (excluding Family Connects and Plan Reconnects "would have materially impacted [Coordinated Care's] expectations of the market opportunity, and we would not have bid on the RFP").

Even the trial court recognized that "it's clear that [the Authority] wanted to give the [New Plans] a greater portion [of assignments]" through the Assignment Methodology. VRP, Jan. 15, 2014, at 63. Further, the Legacy Plans, despite their after-the-fact claims to the contrary, had the same understanding as they were bracing for the impact of the new Assignment Methodology before July 1, 2012. The Legacy Plans understood that the Assignment Methodology would "disadvantage" them, "while quickly bolstering the enrollment of" the New Plans. CP 3064. Indeed, the Legacy Plans undertook a concerted effort to kill key aspects of the RFP through lobbying the Legislature, pressuring the

Authority, and engaging in litigation. Their efforts were targeted at getting the Authority to "throw out" the Assignment Methodology. CP 3038-41 at 80:6-83:22 (CR 30(b)(6) Dep. of CHPW) (CHPW admitting to strategy of determining whether Speaker Chopp had "influence" to get the Assignment Methodology "stopped" because it "discriminated against [the Legacy Plans]").

The Contract's plain language and the extrinsic evidence are directly contrary to the Legacy Plans' contract interpretation. At a minimum, the trial court should have found that disputed material facts precluded summary judgment. *See Tanner Elec. Coop.*, 128 Wn.2d at 674 (improper on summary judgment to weigh competing extrinsic evidence).

3. The meaning of the Contract cannot be based on prior dealings with the Authority to which the New Plans were not parties.

Despite the interdependence of the Assignment Methodology in the Contract, the Legacy Plans argued that the Contract should be interpreted based on their historic Medicaid contracts. CP 1585-86. But the Legacy Plans' prior Medicaid contracts are irrelevant because the new Contract was executed by different parties, for different purposes, and under a wholly new paradigm for healthcare created by the ACA. *See Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 84, 60 P.3d 1245 (2003). To facilitate the Authority's compliance with its new obligations and the

anticipated significant influx of new Medicaid enrollees, the Authority issued the RFP (a new process) and ultimately the Contract in order to increase competition and build capacity in Washington to meet the anticipated demand. CP 2502 at ¶ 8; CP 2505 at ¶ 21; CP 2188 at ¶ 4. Part of this effort was the Authority's promise to award the New Plans significantly higher percentages of enrollees than could be expected by the already-established Legacy Plans as a means to incentivize new plans to come to Washington and facilitate their viability.

In contrast, the Authority's historical contracts with the Legacy Plans were not aimed at increasing competition, expanding coverage, or helping make new MCOs viable operators. Instead, assignments were made under prior contracts based solely on the capacity of an MCO to take on enrollees. *See* CP 2824-25 and CP 2959-60 (under Section 7.14 in Legacy Plans' prior contracts assignments were "calculated based on the Contractor's capacity divided by the total capacity of a service area and then multiplied by the total number of households in a service area."). In short, as the Legacy Plans acknowledged, it was a capacity-based assignment system. CP 2740-2741 at 27:6-28:5 (CR 30(b)(6) Dep. of Molina). Unlike the prior contracts, the Assignment Methodology under the Contract is silent as to capacity and makes assignments based on percentages of the assignment pool, with special preferences for the New

Plans. *Compare* CP 2824-25 and CP 2959-60 (methodology used in Legacy Plans' prior contracts), *with* CP 2537-38 (Section D of the RFP). In that respect, the new Contract was a substantial departure from prior contracts. As CHPW's own documents show, the new contract "completely changed" the assignment process and other critical aspects of the Authority's relationship with MCOs. CP 3030.

Moreover, the Legacy Plans' prior course of dealing with the Authority did not and could not affect the New Plans' understanding of the new assignment process. Course of dealing applies only where the parties to a subsequent contract are the same, which is not the case here. *See Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 661, 266 P.3d 229 (2011) ("A 'course of dealing' refers to dealings between the same parties[.]") (emphasis added); *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 255, 68 S. Ct. 1031, 92 L. Ed. 1347 (1948) (rejecting reliance on prior dealings that did not involve the same parties).

The trial court's ruling on the breach of contract claim ignored the plain language of the Contract and extrinsic evidence as to the Contract's objective and intent. The ruling on the breach of contract claim should be reversed.

B. The Trial Court's Adoption of Mr. King's Draft Recommendation Altered the New Plans' Contractual Rights Without Any Notion of Due Process.

This Court should also reverse the trial court's grant of the procedural claim motion, which states that the Legacy Plans "would have prevailed in accordance with [Mr. King's] decisions, and that [the Legacy Plans] suffered damages thereby[.]" CP 3336. The trial court's ruling is contrary to the Contract's informal, non-binding dispute resolution provision and the evidence confirming Mr. King's limited role. Moreover, this holding offends the most basic requisite of due process by effectively altering the New Plans' contractual rights without notice or the opportunity to be heard. *See Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973) (opportunity to be heard is a fundamental requisite of due process in proceedings where one's legal rights are determined); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) ("Procedural due process requires notice and an opportunity to be heard prior to final agency action."); *see also Taylor v. Sturgell*, 553 U.S. 880, 898, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (noting "fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party").

First, the Contract did not provide for a binding dispute resolution process; the parties agreed only to an informal "process to *address* the

dispute," wherein the Director would "render a written *recommendation*" prior to "any judicial or quasi-judicial proceeding[.]" CP 2566 (Contract, Section 2.9) (empahses added). Here, Director Lindeblad addressed the dispute by delegating to Mr. King authority to hear (but not decide) separate informal conferences with only the Legacy Plans and, subsequently, by convening a settlement conference attended by all of the Plans. CP 2293-94 at ¶¶ 14-15, 19. When the parties were unable to reach a resolution, Director Lindeblad rendered a written recommendation subject to *de novo* review by the trial court. *See* CP 2294-95 at ¶ 20.[6]

Second, the evidence demonstrates that Director Lindeblad did not delegate final decision-making authority to Mr. King. *See, e.g.*, CP 2293-94 at ¶¶ 14-16. Nor did the Legacy Plans believe that Director Lindeblad had done so. In fact, the Legacy Plans acknowledged that Director Lindeblad would be the one making the decision. *See, e.g.*, CP 3231.

Regardless, the Legacy Plans could not and would not have "prevailed in accordance with" Mr. King's draft recommendation, as the trial court erroneously concluded, because Mr. King did not hear from all of the interested parties. Again, the New Plans have a direct and substantial interest in any interpretation of the Assignment Methodology

[6] Notably, even if Mr. King's draft recommendation was given effect, it would be of no consequence as the Authority and/or the New Plans would have then brought a lawsuit and the exact same question of contract interpretation would be before the court for *de novo* review.

because, irrespective of the relief sought, any interpretation of terms could be imputed to the identical contracts between the New Plans and the Authority and affect the Authority's assignments under all five contracts. *See Kenney v. Read*, 100 Wn. App. 467, 474, 997 P.2d 455 (2000) ("When several instruments are made as part of one transaction, they will be read together and construed with reference to each other...even when the instruments do not refer to each other and when the instruments are not executed by the same parties." (citing *Boyd v. Davis*, 127 Wn.2d 256, 261, 897 P.2d 1239 (1995)). Indeed, the Legacy Plans have made clear throughout these proceedings that they would attempt to bind the New Plans to the trial court's summary judgment rulings. *See, e.g.*, Intervenor Coordinated Care's Motion to Modify Ruling, App. 3 (CHPW stating: "I just want to make sure that you are not suggesting that the intervenors are not bound by the summary judgment decisions.") (emphasis in original).

Despite this interdependence of contract language, however, the New Plans did not have *any* opportunity to be heard before Mr. King prepared his draft recommendation interpreting the Assignment Methodology. The New Plans were not informed of, invited to, or allowed to participate in the dispute conferences with Mr. King. *See, e.g.*, CP 2748-49 at 110:25-111:12 (CR 30(b)(6) Dep. of Molina) (acknowledging that none of the New Plans were allowed to participate);

CP 3226-27 (email from Authority staff making clear that the Molina dispute was not open to other parties). While not all administrative determinations necessitate a full administrative hearing before an Administrative Law Judge, due process requires at a minimum notice and an opportunity to be heard prior to final agency action. *See Motley-Motley, Inc.*, 127 Wn. App. at 81. These basic requirements were not offered to the New Plans. Accordingly, the trial court's ruling binding the New Plans to Mr. King's draft recommendation should be reversed.

C. The Trial Court Erred in its Causation Analysis.

As the Authority discusses in its Opening Brief, the trial court also erred by finding the Legacy Plans established causation of damages where they failed to provide any evidence whatsoever related to causation or damages. *See* Authority Br. at 49-50. Further, the trial court erred in its causation analysis because it focused on the wrong issue. "A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant." *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). The trial court did not analyze whether the alleged breach proximately caused damage to the Legacy Plans as required. Instead, the trial court found causation because it determined the Authority caused a breach:

> Is there causation in this particular case? Well, I can't think of any way that there wouldn't be causation under the facts here, and that is, that this breach was caused by the state drafting something in an imprecise way, at the best, and perhaps just making a mistake and not drafting it the way they really subjectively wanted, and that's the cause of the whole situation.

VRP, Jan. 15, 2014, at 63:9-16 (oral decision). In other words, the proper causation inquiry should have focused on whether (1) the Legacy Plans suffered any damage, and (2) whether the Authority's alleged breach proximately caused those damages. The Legacy Plans failed to present evidence or substantive argument on either point. But the trial court sidestepped this analysis and instead found causation based solely on its (incorrect) assumption that the Authority had caused a breach of the Contract. Breach of contractual duty, however, is a separate requirement from proximate causation of damages. *Nw. Indep. Forest Mfrs.*, 78 Wn. App. at 712. The trial court's improper causation analysis renders its summary judgment ruling erroneous.[7]

[7] It is questionable whether the Legacy Plans could establish damages at all, much less proximate causation of damages. Over the first two months of the Contract, the Legacy Plans received a windfall of more than 44,000 additional enrollees that should have been assigned to the New Plans. CP 2664-65; CP 2247-48; CP 2250. The Assignment Methodology was not corrected for two more months. In addition, the Legacy Plans' windfall was compounded as they were then entitled to any Connects and Reconnects associated with the erroneous enrollees.

V. CONCLUSION

The Court should reverse the trial court's orders granting summary judgment to the Legacy Plans, and remand this matter for trial.

RESPECTFULLY SUBMITTED this 15th day of October, 2014.

PACIFICA LAW GROUP LLP

By _____
Matthew J. Segal, WSBA #29797
Gregory J. Wong, WSBA #39329
Jamie Lisagor, WSBA #39946
Attorneys for Coordinated Care Corporation

DORSEY & WHITNEY LLP

By _____ PER EMAIL AUTHORITY FOR
Peter Ehrlichman, WSBA # 6591
Shawn Larsen-Bright, WSBA # 37066
Attorneys for United Healthcare of Washington, Inc.

WILLIAMS KASTNER & GIBBS PLLC

By _____ PER EMAIL ATTORNEY FOR
Mary Re Knack, WSBA # 26945
Manish Borde, WSBA # 39503
Attorneys for Amerigroup Washington, Inc.

CERTIFICATE OF SERVICE

Katie Dillon declares as follows:

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 15thth day of October, 2014, I caused to be served a true copy of the foregoing document (per stipulated agreement by all parties) upon:

David B. Robbins
Madeline J. Engel
Anastasia K. Anderson
Perkins Coie LLP
1201 Third Ave Ste 4900
Seattle, WA 98101-3099
Phone: 206-359-8000
Fax: 206-359-9000
Email: drobbins@perkinscoie.com
Email: mengel@perkinscoie.com
Email: rhoward@perkinscoie.com
Email: aanderson@perkinscoie.com
Email: alockwood@perkinscoie.com
Email: echerry@perkinscoie.com

Attorneys for Plaintiff Community Health Plan of Washington

☐ via facsimile
☐ via overnight courier
☐ via first-class U.S. mail
☒ via email
☐ via electronic court filing
☐ via hand delivery

Timothy J. Parker
Jason W. Anderson
Jackie Unger
Carney Badley Spellman
701 5th Ave Ste 3600
Seattle, WA 98104-7010
Phone: 206-622-8020
Fax: 206-467-8215
Email: parker@carneylaw.com
Email: anderson@carneylaw.com
Email: unger@carneylaw.com
Email: williams@carneylaw.com
Email: saiden@carneylaw.com
Email: doyle@carneylaw.com

☐ via facsimile
☐ via overnight courier
☐ via first-class U.S. mail
☒ via email
☐ via electronic court filing
☐ via hand delivery

Attorneys for Plaintiff Molina Healthcare – Washington, Inc.

William T. Stephens
R. Timothy Crandell
Natalie Cooper
Washington State Attorney General's Office
P.O. Box 40124
7141 Cleanwater Dr SW
Olympia, WA 98504-0124
Phone: 360-586-6565
Fax: 360-586-6659
Email: bills3@atg.wa.gov
Email: timc1@atg.wa.gov
Email: kristib3@atg.wa.gov
Email: pattij@atg.wa.gov
Email: nicolew@atg.wa.gov

☐ via facsimile
☐ via overnight courier
☐ via first-class U.S. mail
☒ via email
☐ via electronic court filing
☐ via hand delivery

Attorneys for Defendants Washington State Health Care Authority

Peter Ehrlichman
Shawn Larsen-Bright
Dorsey & Whitney LLP
701 Fifth Avenue Suite 6100
Seattle, WA 98104-7043
Phone: 206-903-8800
Fax: 206-903-8820
Email: ehrlichman.peter@dorsey.com
Email: larsen.bright.shawn@dorsey.com
Email: sterner.amy@dorsey.com
Email: masterson.nancy@dorsey.com

☐ via facsimile
☐ via overnight courier
☐ via first-class U.S. mail
☒ via email
☐ via electronic court filing
☐ via hand delivery

Attorneys for Defendant
UnitedHealthcare of Washington, Inc.

Mary Re Knack
Manish Borde
Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Phone: 206-628-6600
Fax: 206-628-6611
Email: mknack@williamskastner.com
Email: mborde@williamskastner.com
Email:
criccobuono@williamskastner.com
Email:
mphilomeno@williamskastner.com
Email: dlevitin@williamskastner.com
Email: agraham@williamskastner.com
Email: mbarger@williamskastner.com

☐ via facsimile
☐ via overnight courier
☐ via first-class U.S. mail
☒ via email
☐ via electronic court filing
☐ via hand delivery

Attorneys for Defendant, Amerigroup
Washington, Inc.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

DATED this 15th day of October, 2014.

By